

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CARMEN S. ESLER
Claimant

VS.

FEDERAL EXPRESS CORPORATION
Self-Insured Respondent

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Docket No. 268,119

ORDER

The self-insured respondent appealed then Administrative Law Judge Julie A.N. Sample's Award dated July 11, 2002. The Board heard oral argument on January 7, 2003. Stacy Parkinson was appointed as Board Member Pro Tem for the purpose of determining this matter.

APPEARANCES

Michael R. Wallace of Shawnee Mission, Kansas, appeared for the claimant. Jeffrey D. Slattery of Kansas City, Missouri, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) found the claimant sustained a 14 percent whole body impairment rather than two separate scheduled injuries.

The self-insured respondent argues the claimant sustained a 15 percent scheduled injury to the right upper extremity at the 210-week level and a 10 percent scheduled injury to the left upper extremity at the 200-week level.

Conversely, claimant argues the ALJ's Award should be affirmed because simultaneous injuries to parallel upper extremities are compensated pursuant to K.S.A. 44-510e.

The sole issue raised on review by the parties is the nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board affirms the ALJ's Award.

The Board finds the ALJ's Award contains a detailed recitation of the facts and analysis of the law with findings and conclusions that are supported by the law and the facts contained in the record. It is not necessary to repeat those findings and conclusions in this Order. The Board approves those findings and conclusions and adopts them as its own.

Briefly stated, the evidence established claimant began to experience pain in both of her hands while performing her job duties as a customer service representative for respondent. Claimant received approximately 175 calls a day regarding concerns or complaints. Her job required that she take information from the customer and input (type) it into the computer. Claimant began to experience numbness, tingling and her hands were going to sleep. She also had problems with pain into the right elbow and shoulder. The claimant first experienced the majority of her problems in her right hand and some in the left hand.

Bilateral carpal tunnel syndrome was ultimately diagnosed and Dr. Craig C. Newland performed a right carpal tunnel release on June 5, 2001, and on July 6, 2001, Dr. Newland performed a left carpal tunnel release. Following the surgery, claimant received physical therapy for both hands.

Claimant returned to work with respondent after the physical therapy and was working at the same job at the time of the regular hearing. She is currently experiencing problems in both hands. There is numbness and tingling in both hands as well as burning. The pain radiates from the elbow into the shoulder. The claimant does have difficulty with grasping things.

Dr. Newland concluded that claimant had a 6 percent permanent partial impairment to her right upper extremity at the wrist and a 4 percent permanent partial impairment to her left upper extremity at the wrist which combined for a 6 percent permanent partial functional impairment to the whole body.

Dr. James P. Hopkins performed an examination and evaluation of the claimant on August 17, 2001, at the request of her attorney. Dr. Hopkins opined the claimant's work for respondent continuously aggravated both of her upper extremities. Using the AMA *Guides*,¹ Dr. Hopkins opined the claimant had a 20 percent permanent partial disability

¹ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.).

rating of the right upper extremity above the elbow or the 210-week level and a 10 percent permanent partial disability rating of the left upper extremity at the forearm or the 200-week level. These ratings converted to a 17 percent whole body disability. Dr. Hopkins placed the restriction of taking five minute breaks every hour to do some stretching exercises.

The ALJ referred claimant to Dr. Edward J. Prostic for an independent medical examination. Dr. Prostic examined the claimant on March 12, 2002. The doctor rated claimant at 15 percent to the right upper extremity and 10 percent to the left upper extremity which combined for a 14 percent permanent partial functional impairment to the whole body.

Respondent argues that after surgery the claimant returned to the same job which demonstrates that she did not suffer substantial impairment. Consequently, respondent argues claimant is only entitled to compensation for two scheduled injuries.

The Workers Compensation Act recognizes two classes of injuries other than those which result in death or total disability, and those are permanent disability to a scheduled part of the body and permanent partial general disability.² Scheduled injuries are individually defined and described in K.S.A. 44-510d. The loss of use of a hand, forearm or arm is a scheduled injury.³

When the injury is both to a scheduled member and to an unscheduled portion of the body, or to two parallel extremities, compensation should be awarded under K.S.A. 44-510e.⁴

“When a specific injury and disability is a scheduled injury under the Workmen’s Compensation Act, the benefits provided under the schedule are exclusive of any other compensation.”⁵ K.S.A. 44-510c(a)(2) has been extended by case law to allow compensation for certain combination injuries based on permanent partial disability.⁶

² See K.S.A. 44-510d; K.S.A. 44-510e.

³ K.S.A. 44-510d(a)(13). See also K.A.R. 51-7-8(c)(4).

⁴ See *Pruter v. Larned State Hospital*, 28 Kan. App. 2d 302, 16 P.3d 975 (2000), *aff’d* 271 Kan. 865, 26 P.3d 666 (2001); *Bryant v. Excel Corp.*, 239 Kan. 688, 689, 722 P.2d 579 (1986).

⁵ *Berger v. Hahner, Foreman & Cale, Inc.*, 211 Kan. 541, 545, 506 P.2d 1175 (1973).

⁶ See *Hardman v. City of Iola*, 219 Kan. 840, 844, 549 P.2d 1013 (1976); *Downes v. IBP, Inc.*, 10 Kan. App. 2d 39, 691 P.2d 42 (1984), *rev. denied* 236 Kan. 875 (1985).

In *Murphy*,⁷ the Supreme Court held that simultaneous aggravation to both arms and hands through repetitive use removes the disability from a scheduled injury and converts it to a general disability. “Where a claimant’s hands and arms are simultaneously aggravated, resulting in work-related injuries to both hands and arms, the injury is compensable as a percentage of disability to the body as a whole under K.S.A. 44-510e.”

In *Honn*,⁸ the Supreme Court noted that the schedule of injuries found at R.S. Supp. 1930, 44-510(3)(c)(1) to (20) failed “to provide compensation for both members when they are in pairs.” The Court then analogized to the permanent total statute and concluded that “when two feet are injured, as in the case before us, the compensation should not be computed for each one separately, as for the injury to one foot as provided by the schedule, but should be computed [as a body as a whole injury].”⁹ K.S.A. 44-510c(a)(2) has been amended since *Honn* and now provides, in relevant part, “[l]oss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability.”

Finally, in *Pruter*,¹⁰ the Kansas Supreme Court reaffirmed the applicability of the *Honn* rule to the loss of use of parallel limbs that caused substantial impairments. While *Pruter* dealt with simultaneous injuries, the Board believes the rule is likewise applicable where repetitive trauma injuries are treated as a single accident.¹¹ A scheduled injury may evolve into a general disability through the subsequent occurrence of direct and natural consequences.¹²

The Board finds the Supreme Court’s analysis in *Pruter*, coupled with the language of K.S.A. 44-510c(a)(2), requires an award based upon a general body disability and not two separate scheduled injuries under K.S.A. 44-510d. Accordingly, claimant is entitled to a permanent partial general disability award based upon her 14 percent functional impairment to the body as a whole.

The Board is not unmindful of the language respondent relies upon in *Pruter* which indicated that the *Honn* exception was only applicable to the loss of use of parallel limbs where simultaneous injuries caused substantial impairments. As the ALJ noted in her

⁷ *Murphy v. IBP, Inc.*, 240 Kan. 141, 144, 727 P.2d 468 (1986); *See also Depew v. NCR Engineering & Manufacturing*, 263 Kan. 15, Syl. ¶ 1, 947 P.2d 1 (1997).

⁸ *Honn v. Elliott*, 132 Kan. 454, 295 Pac. 719 (1931).

⁹ *Id.* at 458.

¹⁰ *Pruter v. Larned State Hospital*, 271 Kan. 865, 26 P.3d 666 (2001).

¹¹ *Murphy v. IBP, Inc.*, 240 Kan. 141, 727 P.2d 468 (1986).

¹² *Berger v. Hahner, Foreman & Cale, Inc.*, 211 Kan. 541, 549, 506 P.2d 1175 (1973).

Award, *Pruter* is factually distinguishable because that case involved an acute injury to extremities on the same side. In this case the injuries were repetitive and occurred to both parallel extremities.

Moreover, a substantial impairment is obviously recognized in parallel extremity injuries in the first instance because in the absence of proof to the contrary, injuries to parallel extremities are presumed to constitute a permanent total disability.¹³ And *Honn* noted that at no place in the scheduled disability statute does it provide for compensation for loss of use of both parallel members. Therefore, if the evidence establishes that the injury to both parallel members does not result in permanent total disability then, because the schedule does not provide for loss of use of both parallel members, the injury must be compensated based upon a permanent partial disability pursuant to K.S.A. 44-510e which specifically provides the method to compensate for injuries not covered by the schedule in K.S.A. 44-510d. That statutory analysis in *Honn* was the basis for determination that parallel extremity injuries could not be compensated as two separate scheduled disabilities. Stated another way, because the schedule in K.S.A. 44-510d does not provide for loss of use of both parallel members, if injury to parallel extremities do not result in permanent total disability, then such injuries must be compensated pursuant to K.S.A. 44-510e.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Julie A.N. Sample dated July 11, 2002, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of September 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

¹³ K.S.A. 44-510c(a)(2).

DISSENT

I respectfully dissent from the majority decision and would find claimant suffered two separate scheduled injuries. It is undisputed that claimant's injuries did not result in a permanent total disability. After claimant's bilateral carpal tunnel surgeries she returned to the same job without accommodation. In *Pruter*, the Supreme Court detailed the Court of Appeal's analysis of the cases establishing that parallel extremity injuries be compensated as a permanent partial general disability to the body as a whole under KS.A.44-510e. The analysis concluded with the admonition that the *Honn* case is the exception and should only be applied to the loss of use of parallel limbs where simultaneous injuries caused substantial impairment.

In this case, claimant has returned to her same job without accommodation. She has not suffered substantial impairment, instead she has suffered some loss of physiological function which is compensable as a loss of use for each separate scheduled extremity.

BOARD MEMBER

c: Michael R. Wallace, Attorney for Claimant
Jeffrey D. Slattery, Attorney for Respondent
Kenneth J. Hursh, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director